



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2017-0090; FRL-10222-01-R3]

Air Plan Approval; Delaware; Removal of Excess Emissions Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve certain portions of a state implementation plan (SIP) revision submitted by the State of Delaware, through the Delaware Department of Natural Resources and Environmental Control (DNREC), on November 22, 2016. The revision was submitted by Delaware in response to a national finding of substantial inadequacy and SIP call published on June 12, 2015, which included certain provisions in the Delaware SIP related to excess emissions during startup, shutdown, and malfunction (SSM) events. EPA is proposing to approve two specific provisions of the submitted SIP revision and proposing to determine that such SIP revision corrects some of the deficiencies in Delaware's SIP identified in the June 12, 2015, SIP call. EPA plans to act on the remainder of the SIP revision in a separate action or actions.

DATES: Written comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R03-OAR-2017-0090 at www.regulations.gov, or via email to gordon.mike@epa.gov. For comments submitted at Regulations.gov, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be

accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit www.epa.gov/dockets/commenting-epa-dockets.

FOR FURTHER INFORMATION CONTACT: Mallory Moser, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, Four Penn Center, 1600 John F. Kennedy Boulevard, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-2030. Ms. Moser can also be reached via electronic mail at moser.mallory@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document wherever “we” or “our” is used, it refers to EPA.

I. Background

On February 22, 2013, the EPA issued a *Federal Register* notice of proposed rulemaking outlining EPA’s policy at the time with respect to SIP provisions related to periods of SSM. EPA analyzed specific SSM SIP provisions and explained how each one either did or did not comply with the Clean Air Act (CAA) with regard to excess emission events.¹ For each SIP provision that EPA determined to be inconsistent with the CAA, EPA proposed to find that the existing SIP provision was substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call under CAA section 110(k)(5). On September 17, 2014, EPA issued a document supplementing and revising what the Agency had previously proposed on February

¹ State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 78 FR 12460 (February 22, 2013).

22, 2013, in light of a D.C. Circuit decision that determined the CAA precludes authority of the EPA to create affirmative defense provisions applicable to private civil suits. EPA outlined its updated policy that affirmative defense SIP provisions are not consistent with CAA requirements. EPA proposed in the supplemental proposal document to apply its revised interpretation of the CAA to specific affirmative defense SIP provisions and proposed SIP calls for those provisions where appropriate (79 FR 55920, September 17, 2014).

On June 12, 2015, pursuant to CAA section 110(k)(5), EPA finalized “State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA’s SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction” (80 FR 33840, June 12, 2015), hereafter referred to as the “2015 SSM SIP Action.” The 2015 SSM SIP Action clarified, restated, and updated EPA’s interpretation that SSM exemption and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 36 states were substantially inadequate to meet CAA requirements and issued a SIP call to those states to submit SIP revisions to address the inadequacies. EPA established an 18-month deadline by which the affected states had to submit such SIP revisions. States were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016.

EPA issued a Memorandum in October 2020 (2020 Memorandum), which stated that certain provisions governing SSM periods in SIPs could be viewed as consistent with CAA requirements.² Importantly, the 2020 Memorandum stated that it “did not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific state SIP provisions that were substantially inadequate to meet the requirements of the Act.” Accordingly, the 2020 Memorandum had no direct impact on the SIP call issued to Delaware in 2015. The 2020

² October 9, 2020, memorandum “Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans,” from Andrew R. Wheeler, Administrator.

Memorandum did, however, indicate EPA's intent at the time to review SIP calls that were issued in the 2015 SSM SIP Action to determine whether EPA should maintain, modify, or withdraw particular SIP calls through future agency actions.

On September 30, 2021, EPA's Deputy Administrator withdrew the 2020 Memorandum and announced EPA's return to the policy articulated in the 2015 SSM SIP Action (2021 Memorandum).³ As articulated in the 2021 Memorandum, SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally are not approvable if contained in a SIP submission. This policy approach is intended to ensure that all communities and populations, including overburdened communities, receive the full health and environmental protections provided by the CAA.⁴ The 2021 Memorandum also retracted the prior statement from the 2020 Memorandum of EPA's plans to review and potentially modify or withdraw particular SIP calls. That statement no longer reflects EPA's intent. EPA intends to implement the principles laid out in the 2015 SSM SIP Action as the agency takes action on SIP submissions, including this SIP submittal provided in response to the 2015 SIP call.

With regard to the Delaware SIP, in the 2015 SSM SIP Action, EPA determined that the following regulations were substantially inadequate to meet CAA requirements (80 FR 33973, June 12, 2015): Title 7 of Delaware's Administrative Code (7 DE Admin. Code) 1104 Section 1.5, 7 DE Admin. Code 1105 Section 1.7, 7 DE Admin. Code 1108 Section 1.2, 7 DE Admin. Code 1109 Section 1.4, 7 DE Admin. Code 1114 Section 1.3, 7 DE Admin. Code 1124 Section 1.4, and 7 DE Admin. Code 1142 Section 2.3.1.6. These provisions allow for exemptions from otherwise applicable SIP emission limitations. The rationale underlying EPA's determination that these provisions were substantially inadequate to meet CAA requirements, and therefore to

³ September 30, 2021, memorandum "Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy," from Janet McCabe, Deputy Administrator.

⁴ 80 FR 33985, June 12, 2015.

issue a SIP call to Delaware to remedy the provisions, is detailed in the 2015 SSM SIP Action and the accompanying proposals.

Delaware submitted a SIP revision on November 22, 2016, in response to the SIP call issued in the 2015 SSM SIP Action. Delaware's 2016 SIP submission addressed all of the SIP provisions identified in the SIP call, but this proposed action is only addressing the portion of Delaware's submittal that pertains to 7 DE Admin. Code 1124, Section 1.4 and 7 DE Admin. Code 1142 Section 2.3.1.6. 7 DE Admin. Code 1124 regulates various coating and non-coating sources of VOCs, while 7 DE Admin. Code 1142 controls NO_x emissions from industrial boilers and process heaters at petroleum refineries. EPA is acting on these two provisions first because they are subject to a court ordered deadline of February 22, 2023, whereas the remaining provisions have court ordered deadlines of June 22, 2023, for a proposed action, and October 20, 2023, for a final action. Delaware's 2016 SIP submission showed that these two regulatory provisions had been removed from Delaware's regulations, and therefore Delaware requested that EPA remove these provisions from the Delaware SIP. Delaware's 2016 submission also notes that the deficiency highlighted in 7 DE Admin. Code 1108 Section 1.2 was corrected by a previous SIP revision, which was submitted to EPA on July 10, 2013.⁵ In its 2016 submission, Delaware also requested that EPA approve revisions to the remaining four provisions in the Delaware SIP that were highlighted in the 2015 SSM SIP Action. EPA will be acting on those revisions under a separate action or actions.

II. Summary of SIP Revision and EPA Analysis

EPA is proposing to approve those portions of Delaware's November 22, 2016, SIP submission addressing 7 DE Admin. Code 1124 Section 1.4 and 7 DE Admin. Code 1142 Section 2.3.1.6. Delaware's 2016 SIP submission shows that these two provisions have been removed from Delaware's regulations,⁶ and EPA has confirmed that these two provisions are no

⁵ EPA approval of the July 10, 2013, SIP submittal on July 11, 2022. See 87 FR 41074.

⁶ See Appendix A to Delaware's November 21, 2016, SIP submission, found in the docket for this action.

longer in Delaware's regulations.⁷ Based on Delaware's request to remove these sections from the Delaware SIP, EPA proposes to find that Delaware's November 22, 2016, SIP revision, for 7 DE Admin. Code 1124 Section 1.4 and 7 DE Admin. Code 1142 Section 2.3.1.6 only, is consistent with CAA requirements and addresses two of the seven deficiencies that EPA identified in the 2015 SSM SIP Action with respect to the Delaware SIP. Delaware's 2016 SIP submission also made small, non-substantive style changes to other sections of 7 DE Admin. Code 1142, which EPA is proposing to approve. These changes consisted of inserting the words "subsection" or "section" before references to specific regulatory provisions to conform to Delaware's regulatory style requirements. Also, on July 11, 2022, EPA published a Final Rule which removed the SSM provisions contained in 7 DE Admin. Code 1108, from the Delaware SIP.⁸ EPA will act on the revisions that address the deficiencies in 7 DE Admin. Code 1104 Section 1.5, 7 DE Admin. Code 1105 Section 1.7, 7 DE Admin. Code 1109 Section 1.4, and 7 DE Admin. Code 1114 Section 1.3 in a separate action or actions.

III. Proposed Action

EPA is proposing to approve that portion of Delaware's November 22, 2016, SIP submission addressing 7 DE Admin. Code 1124 Section 1.4 and 7 DE Admin. Code 1142 Section 2.3.1.6. These specific provisions have been removed from Delaware's regulations and this action is proposing to remove these two provisions from the EPA-approved Delaware SIP. EPA is further proposing to determine that this portion of Delaware's 2016 SIP revision corrects two of the seven deficiencies identified in the June 12, 2015, SIP call. EPA is not reopening the 2015 SSM SIP Action and is only taking comment on whether this SIP revision is consistent with CAA requirements and whether it addresses the inadequacies in the two specific Delaware SIP provisions (7 DE Admin. Code 1124 Section 1.4 and 7 DE Admin. Code 1142 Section 2.3.1.6) identified in the 2015 SSM SIP Action.

⁷ See www.regulations.delaware.gov/AdminCode/title7/1000/1100/1124.pdf and www.regulations.delaware.gov/AdminCode/title7/1000/1100/1142.pdf.

⁸ 87 FR 41074

IV. Incorporation by Reference

In this document, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference the amendments to 1124, Control of Volatile Organic Compound Emissions, and 1142, Specific Emission Control Requirements, in section 52.420, as explained in Section II of this preamble. EPA has made, and will continue to make, these materials generally available through www.regulations.gov and at the EPA Region III Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
 - Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
 - Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
 - Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
 - Is not subject to the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
 - Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).
- In addition, this proposed rule, which corrects some of the deficiencies in Delaware's SIP identified in the June 12, 2015, SIP call, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Volatile organic compounds.

Diana Esher,
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